IN THE COURT OF APPEALS OF IOWA

No. 23-0444
Filed February 21, 2024

DAVID J. DOWNEY,
Plaintiff-Appellant,

vs.

TAYLOR N. BROWN,
Defendant-Appellee.

Appeal from the Iowa District Court for Union County, Elisabeth Reynoldson, Judge.

A father appeals a ruling modifying a custody decree's child-support provisions. The mother seeks appellate attorney fees. **AFFIRMED AND REMANDED WITH DIRECTIONS TO DETERMINE ATTORNEY FEES.**

Robert J. Engler of Cambridge Law Firm, P.L.C., Atlantic, for appellant.

Amanda Demichelis of Demichelis Law Firm, PC, Chariton, for appellee.

Considered by Bower, C.J., and Buller and Langholz, JJ.

BULLER, Judge.

This appeal is from a modification action tried to the court, flowing from the decree establishing paternity and custody of David Downey and Taylor Brown's child. The district court modified David's child support down to $600 per month but varied the support upward an additional $200 for Taylor's incurred childcare expenses, for a total of $800 per month. David challenges the variance on appeal, and Taylor requests appellate attorney fees. We affirm the variance, order David to pay Taylor's reasonable appellate attorney fees, and remand for the district court to determine a reasonable amount.

The parties entered a stipulated paternity and custodial decree in 2019. Taylor received physical care of the parties' child and the decree granted David visitation every other weekend, alternating holidays, and one week per month in the summer. David also agreed to pay $1000 per month in child support.

In 2022, David petitioned to reduce his child-support obligations, alleging his income had "substantially decreased" and Taylor's had "increased." Taylor, for her part, requested David's child-support obligation be set at $800 per month, recognizing both his reduced income and the child-care expenses necessary for her to be employed outside the home. As of the modification hearing, the parties agreed David was behind on child-support payments, though they did not agree on how much.

David testified he was earning somewhat less in 2023 than he was in 2019, because of economic conditions and the loss of equipment for his excavation business due to a fire. He explained he chose to work seasonally rather than year-round to keep "the luxury of time with [his child]" and because he was not sure he

would make much more elsewhere. In his current occupation, David works full-time about nine months out of the year and—in his words—"I am at home. I—I don't do anything" the other three months. At least some years, he collects unemployment during the off-season, though at the time of the trial he was working between twenty and thirty hours a week. After averaging out some of David's figures based on seasonal differences, the district court found he earned $43,500 per year. The guidelines yielded a monthly child-support payment of $600.

In terms of expenses, David admitted he did not pay rent, a mortgage, or vehicle payments because those costs were covered by his father. David's father also paid off his business debts, provided him with spending money, and paid between $6000 and $8000 of David's outstanding child-support arrearage. David reported he pays for his own food and "sometimes" contributes to the utilities.

Taylor's income is similar to David's but slightly less, at $42,782.78 per year. Taylor's expenses include daycare so she can work full-time as a nurse. Taylor estimated her daycare costs at approximately $100 per week or $400 per month; she divided that figure in half as the basis for her request for a $200 per month variation from the guidelines.

The district court ordered David to pay the $600 basic payment required by the guidelines, plus a $200 variance for child-care expenses, for a total of $800 per month. The court ordered that the child-care-expense variance would expire when the child turns thirteen. David appeals, challenging the variance.

Although we review modifications de novo, we review the specific issue of variances from the child-support guidelines for an abuse of discretion. *Markey v. Carney*, 705 N.W.2d 13, 19 (Iowa 2005); *In re Marriage of Thede*, 568

N.W.2d 59, 61 (Iowa Ct. App. 1997). A child-support calculation based on the guidelines is presumed correct and any variation requires a record or written findings that doing so is "necessary to provide for the needs of the children or to do justice between the parties under the special circumstances of the case." Iowa Ct. R. 9.4; *accord* Iowa Code §§ 600B.25 (2022) (establishing support payments consistent with section 598.21B), 598.21B(2)(c), (d) (rebuttable presumption and variance requirements); *Markey*, 705 N.W.2d at 19.

"[T]he cost of child care is not included in the economic data used to establish the support amounts," so the district court may grant a requested upward variance to reflect these expenses. Iowa Ct. R. 9.11A. A child-care-expenses variance should be "liberally granted" and based on "actual, annualized child care expenses" incurred because of employment, training, or job searches. *Id.*

David first contests whether any child-care variance is warranted. He complains the district court unfairly considered that his father is covering the vast majority of his expenses, and he speculated that support may soon end. We see no abuse of discretion in the court considering David's lack of expenses when determining whether to impute any income to him. *See* Iowa Ct. R. 9.11(4) (allowing imputation of income based on voluntary un- or underemployment). The district court calculated David's income based on his testimony of hours worked and hourly wage. The district court also made a finding he "acknowledged that he could make more money working for someone else" but chose to stay underemployed. The court's calculations are based on the child support guidelines, and the upward variance amount was David's proportional share of the

necessary child-care expenses based on the parties' respective incomes. *See* Iowa Ct. R. 9.11A(3).

David also contests the amount of Taylor's child-care expenses, pointing to evidence he claims undermined her testimony. To the extent there was a conflict in the evidence, the district court resolved it by crediting Taylor's testimony, and we defer to that credibility assessment. Iowa R. App. P. 6.904(3)(g). As David admits, testimony is evidence, and thus a parent's testimony on child-care expenses is legally sufficient. *See In re Marriage of Renken*, No. 22-0167, 2022 WL 3440828, at *6 (Iowa Ct. App. Aug. 17, 2022) (using "testimony" as the basis for determining actual child-care expenses).

Last, Taylor asks for appellate attorney fees. David did not file a reply brief, leaving Taylor's request uncontested. Even if David had resisted, we would exercise our discretion and order him to pay Taylor's appellate fees: she prevailed in litigation below and on appeal and she had a duty to defend the district court. *See* Iowa Code § 600B.26; *Markey*, 705 N.W.2d at 26 (on factors relevant to ordering appellate attorney fees). Unfortunately, Taylor did not file a fee affidavit, so we must remand with directions for the district court to determine reasonable appellate attorney fees and order David to pay Taylor in that amount.

AFFIRMED AND REMANDED WITH DIRECTIONS TO DETERMINE ATTORNEY FEES.